

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
EASTERN ZONAL BENCH: KOLKATA**

REGIONAL BENCH – COURT NO. 1

**Customs Appeal No. 78922 of 2018**

(Arising out of Order-in-Appeal No. 76/Pat/Cus/Appeal/2018 dated 30.07.2018 passed by the Commissioner (Appeals) of Central GST & Central Excise Patna 2<sup>ND</sup> Floor, C. R. Building (Annexe), Bir Chand Patel Path, Patna)

**M/s. ITC Limited,**  
Plot No. 3, Sector-5,  
IMT Manesar, Haryana-122050

**: Appellant**

**VERSUS**

**Commissioner of Customs,**  
Land Customs Station, Jogbani,  
Araria, Bihar-854328

**: Respondent**

**APPEARANCE:**

Shri J. P. Khaitan, Sr. Advocate  
Shri Agnivesh Sengupta, Advocate  
Shri Jay Bohra, Advocate for the Appellant

Shri D. Sue, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)**  
**HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 77322/2025**

DATE OF HEARING / DECISION: 07.08.2025

**Order: [PER SHRI K. ANPAZHAKAN]**

The present appeal has been filed against the Order in Appeal No. 76/Pat/Cus/Appeal/2018 dated 30.07.2018 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Patna, wherein the Ld. Commissioner (Appeals) has upheld the rejection of refund claim of additional customs duty (CVD) paid by M/s. ITC Ltd (herein after referred as the appellant) to the tune of Rs.1,40,33,559/- during the period October, 2006 to December, 2013.

2. The facts of the case are that during the relevant period, the Appellant imported readymade garments through various ports including Land Customs Station, Jogbani. The Appellant claimed exemption from the payment of additional customs duty ("CVD") under the Customs Tariff Act, 1975 read with *Notification No. 30/2004-C.E. dated 09.07.2004*. The Customs Department disputed such claim on the ground that the condition stipulated in the proviso contained in the said notification that no Cenvat credit of the duty paid on the inputs should have been taken by the manufacturer under the provisions of the Cenvat Credit Rules 2004 was not capable of being satisfied in respect of imported goods. On the other hand, the appellant's contention was that since the goods imported by it were manufactured outside India, the question of availing of Cenvat credit on the inputs under the provisions of the Cenvat Credit Rules 2004 did not arise and as such the condition stood fulfilled.

2.1. Since the Customs Authorities were unwilling to clear the consignments without payment of CVD, the appellant decided to pay the duty 'under protest' and submitted a letter of protest dated September 4, 2004 to the Deputy Commissioner of Customs, New Custom House, IGI Airport, New Delhi, where the dispute first arose. In the said letter, the appellant indicated that it would not pass on the burden of CVD to the consumers and it would be entirely borne by them. The appellant further stated that it would claim refund as and when it succeeded in its contention in the original/appellate proceedings.

2.2. Against the adverse assessment order passed by the Delhi Customs Authorities, the appellant filed

appeal before the Commissioner of Customs but was unsuccessful. Thereupon, the appellant preferred further appeal before the Tribunal which was also rejected by order dated June 17, 2008 reported in *2009 (237) ELT 173 (Tri. Del.)*. Against the said decision of the Tribunal, the appellant preferred an appeal before the Hon'ble Supreme Court, being Civil Appeal No. 1623 of 2009, which was admitted by the Hon'ble Supreme Court on March 30, 2009. The said Civil Appeal was ultimately allowed by the Hon'ble Supreme Court on March 26, 2015 by the judgment reported in *2015 (318) ELT 607 (SC)*. The Department filed review petition in respect of the said judgment dated March 26, 2015, which was dismissed by the Hon'ble Supreme Court on July 15, 2016 as reported in *2016 (340) ELT A202(SC)*.

2.3. Since the appellant had not accepted the levy of CVD and had been contesting it, payment of CVD by the appellant across all Ports/Land Customs Stations was under protest. At some places, the protest was recorded on the TR 6 challans/bills of entry.

2.4. The appellant started importing readymade garments through LCS Jogbani in a major way from July 2008. The appellant submitted a formal letter of protest to the Assistant Commissioner of Customs, LCS Jogbani on March 4, 2009. The Appellant submitted that they had attempted to register "under protest" payments at LCS Jogbani even prior to 04.03.2009, but, the authorities at the said LCS refused to accept payment under protest prior to 04.03.2009. It was only after much persuasion and insistence that the authorities at the said LCS finally permitted the Appellant to submit the protest letter

on 04.03.2009, which the appellant did after inserting the date of submission by hand.

2.5. After the decision of the Hon'ble Supreme Court on March 26, 2015, the Appellant filed a refund claim dated 08.03.2016 for an amount of Rs.1,40,33,559/- with the Assistant/Deputy Commissioner of Customs, LCS Jogbani for the relevant period along with supporting documents on 11.03.2016. Out of the said amount, only a sum of Rs.1,13,097 pertained to an import made under a bill of entry dated October 28, 2006. The rest of the amount pertained to the period from July 2008 to December 2013. One of the enclosures submitted by the appellant with the said refund claim was a Chartered Accountant's certificate to the effect that the said sum of Rs.1,40,33,559 had been shown under "loans and advances"; that it was not inbuilt in the sale price of the garments and that the burden thereof had not been passed on to anyone.

2.6. By a letter dated March 15, 2016, the Assistant Commissioner returned the original application along with all enclosures since according to him there was no judgment/decision passed by the Hon'ble Supreme Court where the Assistant Commissioner, LCS Jogbani/Department was the respondent. By a letter dated May 27, 2016 the appellant drew the attention of the Assistant Commissioner to the judgment dated March 26, 2015 of the Hon'ble Supreme Court. The appellant stated that the Department was represented by the Commissioner of Customs (Import and General), New Delhi in the proceedings before the Hon'ble Supreme Court and was bound by the aforesaid

judgment. The appellant resubmitted its refund application with enclosures.

2.7. By a letter dated July 4, 2016, the Deputy Commissioner, LCS Jogbani again returned the original application with the observation that certain documents had not been submitted. By a letter dated November 17, 2016 submitted on November 29, 2016, the appellant furnished its answer in respect of the requisitions contained in the letter dated July 4, 2016 and resubmitted its refund claim.

2.8. Thereafter, a Show Cause Notice dated 14.01.2017 ("SCN") was issued to the Appellant, proposing to reject the refund claim on the purported ground that it was time-barred. The Appellant submitted its reply dated 28.02.2017 to the SCN at the time of personal hearing before the Adjudicating Officer held on 28.02.2017 and also filed additional written submission dated 05.04.2017.

2.9. On adjudication, the Ld. Adjudicating Officer, vide an ex-parte Order-in-Original dated 13.07.2017, rejected the refund claim. Aggrieved by the OIO, the Appellant preferred an appeal before the Commissioner (Appeals) on 15.07.2017. The Commissioner (Appeals), vide an ex-parte Order in Appeal dated 30.07.2018 ("*impugned order*"), dismissed the appeal.

2.10. Aggrieved against the impugned order rejecting the refund claim, the appellant has filed this appeal.

3. The appellant submits that they have submitted the refund application to the Adjudicating Authority by letter dated March 8, 2016, with complete documentation on 11.03.2016. Thus,

March 11, 2006 has to be taken as the date of submission of refund application. The date of any subsequent resubmission of the application upon its return by the Department or submission of further documents in response to the queries raised by the authorities cannot be treated as the date of submission for the purposes of section 27 of the Customs Act, 1962. In this regard, the appellant placed their reliance on the following decisions:

- *Rubberwood India (P) Ltd v. Commissioner - 2006 (206) ELT 536 (Tri-Bang)*
- *Goodyear India Ltd v. Commissioner - 2002 (150) ELT 331 (Tri-Delhi)*
- *Tab India Granites Pvt Ltd v. Commissioner - 2016 (4) TMI 65*

3.1. The refund application submitted on 11.03.2016, was within one year from the date of the Supreme Court ruling on 26.03.2015. The submission of the appellant is that the Ld. Commissioner (Appeals) rightly recognized the applicability and binding nature of the judgment dated March 26, 2015 of the Hon'ble Supreme Court and the maintainability of the refund application in respect of CVD paid at LCS, Jogbani within one year of the said judgment.. Thus, the appellant submits that the refund application filed by them within one year from the date of date of the Supreme Court ruling on 26.03.2015, cannot be rejected as barred by limitation.

3.2. The appellant further submits that duty payments were made "under protest" and hence, the question of time bar does not arise. In this regard, the appellant submits that the dispute with regard to leviability of CVD arose for the first time in September 2004 in respect of an import consignment dealt with by the New Delhi Customs authorities resulting in submission of the protest letter dated September 4, 2004. By the said letter, the appellant made clear its intention to pursue the matter in appellate proceedings in the event of an adverse adjudication. The appellant stated that it would not pass on the incidence of the duty and would claim refund in the event of success. In view of the categorical stand taken by the appellant at the very inception, there can be no doubt that it had not accepted the levy and disputed it. Such dispute was resolved in the appellant's favour by the Hon'ble Supreme Court after nearly 11 years on March 26, 2015. The maintainability of the refund claim under section 27 in respect of CVD paid at LCS, Jogbani within one year from the judgment dated March 26, 2015 of the Hon'ble Supreme Court has been rightly accepted by the Commissioner (Appeals). It is the submission of the appellant that the protest letter dated September 4, 2004 and the subsequent diligent pursuit of the matter right up to the Hon'ble Supreme Court, is sufficient to show that on and from September, 2004, all the payments of CVD made by them on readymade garments imported across different ports, were under protest. The appellant also made its protest known at other ports, inter alia, by making appropriate endorsements on bills of entry/TR-6 challans. In such circumstances, the Deputy Commissioner should not have been

dismissive of the appellant's averment that it had sought to formally lodge its protest contemporaneously also at Jogbani, where major imports of readymade garments commenced from July 2008, but was not successful till it was able to persuade the authorities at LCS, Jogbani to accept the protest letter on March 4, 2009. Thus, the appellant submits that the Deputy Commissioner was unjustified in holding that there was no protest before submission of the letter dated March 4, 2009.

3.3. It is well settled that it is not necessary that duty payment should be accompanied by the words "under protest" and if conduct of the assessee indicates that payment was not voluntary and out of compulsion, it is to be considered as payment made 'under protest'. In this regard, the appellant placed their reliance on the following decisions:

- *C.C.E., Chandigarh-I v. Ind Swift Lands Ltd. [2017 (6) G.S.T.L. 21 (P & H)*
- *C.C.E., Chennai-I v. ITC Ltd. [2005 (185) E.L.T. 114 (Mad.)*
- *Ex. Engr., Workshop Divn., M.P. Electricity Board v. C.C.E., Raipur [1997 (94) E.L.T. 445 (S.C.)*

3.4. The appellant submits that where the duty is paid under protest, it is a case of provisional assessment which does not have to be separately challenged for obtaining refund. The Appellant submitted that they had made payment of CVD under protest and it is a settled principle that when duty is paid under protest, the assessment is required to be treated as provisional, if the protest is not vacated by holding that duty payment at the

time of clearance was correct. In the instant case, the authorities at LCS, Jogbani did not pass any reasoned/speaking order vacating the protest. As such, the assessments were provisional and not final and it was not necessary to separately prefer any appeal against such provisional assessments in order to obtain refund. When the assessments would have been finalised in accordance with the law laid down by the Hon'ble Supreme Court by its judgment dated March 26, 2015, it would have been incumbent upon the authorities to grant consequential refund to the appellant. In such cases, the decisions of the Hon'ble Supreme Court in *Collector v Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (SC)*, *Priya Blue Industries Ltd. v Commissioner, 2004 (172) ELT 145 (SC)* and *ITC Ltd. v Commissioner, 2019 (368) ELT 216 (SC)* have no application. In this regard, reliance is placed on the decision of this Tribunal in the case of *Commissioner of Customs Kolkata (Preventive) v. M/s. Raymond Apparel Limited [Customs Appeal No. 75200 of 2023 decided on 02.05.2024 – Para 10.1, 11 to 11.3]*

3.5. Similar rulings have been passed in the following cases:

- *HDFC Bank v. Principal Commissioner of GST & Central Excise [2020 (7) TMI 362 CESTAT Chennai]*
- *Commissioner of Customs v. M/s. Sakthi Sugars Ltd. [2020 (4) TMI 840]*

3.6. Without prejudice to the above submissions, the appellant also submitted that refund can be claimed by seeking modification/amendment of the assessment on the bill on entry under Section 149,

that is, without preferring any appeal against the assessment. Section 149 does not prescribe any time limit for amending the Bill of Entry filed and assessed. The protest letter and the refund application can be treated as an application for amendment of the Bill of entry under section 149. In this regard, reliance is placed on *M/s. Sony India Pvt. Ltd. v. UOI* [2021 (8) TMI 622]. Special Leave Petition in respect of the said decision has been dismissed by the Hon'ble Supreme Court in *UOI v. M/s. Sony India Pvt. Ltd.* reported in [2023 (4) TMI 1086]. The Customs authorities can reassess the Bills of entry on the basis of a refund application where customs duty has been paid under protest. In this regard, reliance is placed on *RKC Infrabuilt Pvt. Ltd. v. UOI* [(2024) 22 Centax 230 (Guj.).

3.7. Further and in any event and without prejudice to the aforesaid, the Deputy Commissioner having accepted that the protest letter was submitted on March 4, 2009, he should have at least granted refund of Rs.91,02,729 relating to the period from March 4, 2009 and he erred in proceeding on the basis as if the refund claim was maintainable only in respect of four bills of entry of the year 2013.

3.8. The appellant further submits that they had established that it had not passed on the burden of duty to anyone and the same was borne by it, which was certified by a Chartered Accountant. The Chartered Accountant had certified that the amount of Rs. 1,40,33,559 paid as CVD under protest had been shown under "loans and advances"; that it was not inbuilt in the sale price of the garments and that the burden thereof had not been passed on to anyone. The appellant submits that the authorities

below wrongly ignored the certificate and arbitrarily assumed that the appellant had passed on the incidence of CVD merely by comparing the appellant's sale price with the FOB value of a few items. The lower authorities failed to consider that several charges were incurred by the appellant before selling the goods to the consumers like, freight, distribution charges, packaging and labelling charges, administrative charges etc.

3.9. The appellant submits that non-availability of original copies of TR-6 Challans is merely a hyper technical objection and refund cannot be denied on such ground. It is a settled principle that even if original TR-6 challans are not available, the assessee cannot be denied refund when payment of duty can be verified from the Department's records. In this regard, reliance is placed on:

- *The Commissioner of Customs, Cochin v. M/s Shree Simandar Enterprises [2012-TIOL-624-HC-KERALA-CUS*
- *Hindustan Colas Ltd v. Commissioner - 2019 (10) TMI 1156*
- *Sambhav Enterprises v. Commissioner - 2011 (265) ELT 113 (Tri-Bang)*

3.10. The appellant submits that just like the OIO, the OIA was also passed ex-parte in gross violation of principles of natural justice without providing adequate opportunity to the Appellant to present its case.

3.11. In view of the above submissions, the appellant prayed for setting aside the impugned

order and allow the Refund Application dated 08.03.2016 filed by the Appellant.

4. The Ld. A.R. reiterated the findings in the impugned order. The Ld. A.R. submits that the Refund application, complete in all respects, was submitted on 29.11.2016. Therefore, the refund application was time-barred as the period of import ended in December, 2013.

4.1. With the introduction of self-assessment procedure in the year 2011, those Bills of Entry filed prior to 08.04.2011 and not challenged by the importer, attained finality and, therefore, Refund application for the period before 08.04.2011 was not maintainable. The assessment orders on the Bills of Entry cleared through LCS, Jogbani, were neither modified by way of appeal nor were subject matter before the Hon'ble Supreme Court and, as such, the time period of one year from the date of judgment of the Hon'ble Supreme Court, was not available to the Appellant in the instant case.

4.2. The Ld. A.R. further submits that Original copies of some of the TR-6 challans were not presented and refund cannot be sanctioned on the basis of photocopies of the same. Further, letter regarding payment of CVD under protest on 04.03.2009 signifies that the payment of CVD before 04.03.2009 was without any protest.

4.3. The Ld. A.R. further submits that though the refund claim in respect of four Bills of Entry was in time, the Appellant was not entitled to the refund as it had passed on the incidence of duty to the buyer of goods.

4.4. Accordingly, the Ld. A.R. supported the rejection of the refund claim filed by the appellant.

5. Heard both sides and perused the appeal documents.

6. We observe that the appellant imported readymade garments through various ports including Land Customs Station, Jogbani. The Appellant claimed exemption from the payment of CVD under the Customs Tariff Act, 1975 read with *Notification No. 30/2004-C.E. dated 09.07.2004*. The Customs Department disputed such claim on the ground that the condition stipulated in the proviso contained in the said notification that not been fulfilled. We observe that the issue has been finally settled by the Order passed by the Hon'ble Supreme Court on 26.03.2015 in the case of VVF. We observe that the appellant has filed the refund application on 11.03.2016, which is within the period of one year from the order passed by the Hon'ble Supreme Court on 26.03.2015 in the case of VVF. We observe that the Ld. Commissioner (Appeals) has rightly recognised the applicability and binding nature of the judgment dated March 26, 2015 of the Hon'ble Supreme Court and the maintainability of the refund application in respect of CVD paid at LCS, Jogbani within one year of the said judgment. Thus, we observe that the refund application filed by the appellant within one year from the date of date of the Supreme Court ruling on 26.03.2015, cannot rejected as time barred.

6.1. We observe that duty payments were made "under protest" and hence, the question of time bar does not arise. We observe that the dispute with regard to leviability of CVD arose for the first time in

September 2004 in respect of an import consignment dealt with by the New Delhi Customs authorities. As the customs authorities have not extended the benefit of exemption from the payment of CVD under the Customs Tariff Act, 1975 read with *Notification No. 30/2004-C.E. dated 09.07.2004*, the appellant paid the duty under protest by submitting letter dated September 4, 2004. By the said letter, the appellant made their intention clear to pursue the matter in appellate proceedings in the event of an adverse adjudication. In view of the categorical stand taken by the appellant at the very inception, we observe that there can be no doubt that the appellant had not accepted the levy and disputed it. Such dispute was resolved in the appellant's favour by the Hon'ble Supreme Court after nearly 11 years on March 26, 2015. We observe that the submission of the protest letter dated September 4, 2004 and the subsequent diligent pursuit of the matter right up to the Hon'ble Supreme Court by the appellant, is sufficient to show that from September 2004 onwards all the payments of CVD made by them on readymade garments imported across different ports, were under protest. We also find that the appellant also made their protest known at other ports, inter alia, by making appropriate endorsements on bills of entry/TR-6 challans. We observe that when duty payments were made "under protest" the question of time bar does not arise. In such circumstances, we observe that the Deputy Commissioner was not justified in holding that there was no protest before submission of the letter dated March 4, 2009. Thus, we hold that the rejection of the refund claim by the lower authorities on the ground of 'time barred', is not sustainable.

6.2. In support of this view, we rely upon the decision in the case of *C.C.E., Chandigarh-I v. Ind Swift Lands Ltd.* [2017 (6) G.S.T.L. 21 (P & H), wherein it has been held as under:

*"The second proviso furnishes a complete answer in favour of the assessee. It states that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty, has been paid under protest. Even assuming that the application for refund of amounts paid in such circumstances, is to be made under Section 11B(I), in the present case the application would not be barred by limitation as the amounts were paid under protest. The period of limitation, if any, therefore, would clearly be inapplicable to the assessee. It was not contended before us that any other period of limitation applies and that under such a provision, the claim would be barred nevertheless. An act, including a payment can be made under protest in several ways. For the act to be under protest, it is not necessary that it be accompanied by the very words "under protest". Whether an act is performed under protest or not must be determined on the basis on which it is performed. If the conduct indicates that it is not voluntary and is done out of compulsion it is under protest even within the meaning of these words in the second proviso to Section 11B(1) of the Act which we will refer to shortly."*

6.3. We also observe that the refund claims filed by the appellant has been rejected on the allegation that, with the introduction of self-assessment procedure in the year 2011, those Bills of Entry filed prior to 08.04.2011 were not challenged by the importer, and hence the same attained finality. Therefore, it was held in the impugned order that the

refund application for the period before 08.04.2011 was not maintainable. In this regard, we observe that where the duty is paid under protest, it is a case of provisional assessment which does not have to be separately challenged for obtaining refund. It is a fact on record that the appellant had made payment of CVD under protest. It is a settled principle that when duty is paid under protest, the assessment is required to be treated as provisional, if the protest is not vacated by holding that duty payment at the time of clearance was correct. In the instant case, we observe that the authorities at LCS, Jogbani did not pass any speaking order vacating the protest. As such, we hold that the assessments in this case are to be treated as provisional and not final and it was not necessary to separately prefer any appeal against such provisional assessments in order to obtain refund. When the assessments would have been finalized in accordance with the law laid down by the Hon'ble Supreme Court by its judgment dated March 26, 2015, it would have been incumbent upon the authorities to grant consequential refund to the appellant.

6.4. In such cases, we observe that the decisions of the Hon'ble Supreme Court in *Collector v Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (SC)*, *Priya Blue Industries Ltd. v Commissioner, 2004 (172) ELT 145 (SC)* and *ITC Ltd. v Commissioner, 2019 (368) ELT 216 (SC)* have no application. The case of the appellant is squarely covered by the decision of this Tribunal in the case of *Commissioner of Customs Kolkata (Preventive) v. M/s. Raymond Apparel Limited [Customs Appeal No. 75200 of 2023 decided on 02.05.2024]*. The relevant part of the said decision is reproduced below:

*"10.1. Admittedly, the duty was paid by the respondent under protest. Unless and until the protest is not vacated by a speaking order, the duty paid under protest shall remain paid under protest. In these circumstances, the time-limit prescribed under Section 11B of the Central Excise Act of one year to file refund claim of duty paid is not applicable. Therefore, we hold that the refund claims filed by the respondent, under protest, are filed by the respondent in time.*

*11. Further, we find that another issue has taken by the Revenue is that as the assessment of bills of entry had become final, therefore, without challenging the assessment of bills of entry, the refund claims were not maintainable in the light of the decision of the Hon'ble Apex Court in the case of ITC Limited v. Commissioner of Central Excise, Kolkata-IV [2019-VIL-32-SC-CU].*

*11.1. Again, we find that in this case, duty at the time of assessment had been paid by the respondent under protest. If duty paid is under protest, the same is deemed to be provisionally assessed, as protest has not been vacated by holding that duty paid by the respondent at the time of clearance of goods is correct. In these circumstances, the refund claims cannot be denied by holding that the assessment of the bills of entry had not been challenged by the respondent.*

*11.2. The Ld. Commissioner (Appeals) has examined all these issues in the impugned orders in detail and observed as under (as extracted from Order-in-Appeal No. KOL/CUS(CCP)/AKR/284/2022 dated 16.06.2022) : -*

*"10. Further, I have noticed that the department has accepted that in 174 nos. of Bill of Entry, the duty was paid under protest. The Reviewing Authority has also accepted this aspect and nowhere disputed the same. He observed that even if duty was paid under*

*protest, the respondent is still require to file appeal against such Bills of Entry following the ratio of judgment of ITC Ltd. v. CCE, Kolkata -IV, 2019- VIL-32- SC-CU. I find that this is the crux of the matter to decide if duty is paid under protest whether the ratio of decision in the matter of ITC Ltd. v. CCE, Kolkata -IV, 2019- VIL 32-SC-CU is applicable or otherwise.*

11. *I find that once the duty is paid under protest, the assessing authority is under obligation to pass a speaking order on the assessment of bill of entry and the Bill of Entry can be said to have attained finality as protest has to be vacated by passing of a reasoned speaking order. Since the department has accepted that the duty was paid under protest in the impugned 174 Bills of Entry, therefore without passing speaking orders for the same. the protest lodged by the respondent is still required to be vacated and assessment done on the impugned Bills of Entry had not attained finality In this regard, I find that the adjudicating authority keeping in view the decision of Hon'ble Supreme Court in the matter of ITC Ltd. v. CCE. Kolkata IV. 2019- VIL-32-SC-CU, further relied upon the decision made In the case of CINCINNATI MILACRON LTD. Vs. COMMISSIONER OF CUS (ACC), MUMBAI, 2009 (236) E.L.T.619 (Tri- Mumbai) wherein Hon'ble Tribunal has held that protest payment is itself a challenge to assessment on Bill of Entry. Relevant portion of the decision relied upon by the adjudicating authority is reproduced below:-*

*"2. I have heard both sides. The goods were imported by the appellants under the free warranty replacement. The benefit of exemption in terms of notification 80/70 was denied to them on the basis that the Bills of Entry were assessed on merits. Duty was paid under protest and the goods were cleared and subsequent to clearance of the goods, refund claims were filed without challenging the assessment order. The claims for refund were however sanctioned by the original adjudicating authority but found to be hit by the bar of unjust enrichment and hence the amounts have been directed to be credited to the Consumer Welfare Fund. The importers filed appeal before the lower appellate authority on the ground that the refund claims ought to have been paid over to them, as they had sufficient documentary evidence to establish that they have not passed on the incidence of duty on the goods to their customers but borne such duty burden themselves. The Commissioner (Appeals) however, instead of examining the issue raised before him in the appeal, went on holding that the appellants have no right to claim refund for the reasons that the orders of assessment have not been challenged. In the cases of Commissioner of Customs, Bangalore v. Spice Communication 2005 1190) E.L.T. 340 (Tri-Bang.), Styleman v. Commissioner of Customs,*

*Chennai - 2006 (198) E.L.T. 559 (Tri-Chennai) and Bharti Sons u. Commissioner of Central Excise, Amritsar - 2006 (206) E.L.T. 932 (Tri-Del.), it has been held that the payment of duty under protest is itself a challenge to the assessment on the Bill of Entry. The decisions of the Apex Court in Collector v. Flock (India) Pvt. Ltd. - 2000 (120) E.L.T. 285 (S.C.). Priya Blue Industries Ltd v. Commissioner - 2004 (172) E.L.T. 145 (S.C.) and the decision of the Larger Bench in Commissioner of Customs (Import), Nhava Sheva v. Eurotex Industries & Exports Ltd - 2007 (216) ELT. 137 (Tri-LB) holding that refund claim is not maintainable, in the absence of any challenge to the assessment order do not relate to cases where the duty has been paid under protest. In these circumstances and also for the reason that the Commissioner (Appeals) rejected the appeals of the importers on a ground not raised in the appeal filed before him by the importers, I set aside the impugned order and remand the case to the adjudicating authority to consider the case laws relied upon by the importers, to the effect that payment of duty under protest (it is admitted that the appellants herein paid duty under protest) itself amounts to a challenge to the assessment of the Bill of Entry and if this submission found acceptable, then to consider the evidence brought on record by the importers to rebut the legal presumption that duty burden has been passed on by them to their customers. He shall pass orders after extending reasonable opportunity to the appellants of being heard."*

*I find that relying on above observation the adjudicating authority held that in the instant case all the Bills of Entry shall be considered as a challenge to the assessment order (as required in decision of ITC supra) as the duty has been paid under protest and therefore the respondent was eligible for notification benefit.*

*12. From the above observation of the adjudicating authority I have also noticed that since the order in the matter of CINCINNATI MILACRON LTD. Va. COMMISSIONER OF CUS (ACC), MUMBAI, 2009(236) E.L.T.619 (Tri-Mumbi) was passed prior to decision of ITC Ltd. v. CCE. Kolkata IV. 2019- VIL-32-SC-CU, the requirement of challenge of assessment of Bill of Entry for refund purpose as per ITC judgment supra in case of duty paid under protest needs to be examined in the matrix of latest judicial pronouncements especially after the decision of ITC supra.*

*13. As regards to the above, I find that in the matter of HDFC Bank Vs. Principal Commissioner of GST & Central Excise 2020 (7) TMI 362 CESTAT CHENNAI, Hon'ble Tribunal has held as under:*

1.....The above appeal has been filed by the appellant aggrieved by the rejection of refund claim by the authorities below observing that the assessment of Bill of Entry has not been challenged by the appellant by filing appeal before appropriate forum.

2. Today, when the matter came up for hearing, learned counsel Shri T. Sundaranathan appeared and argued the matter. It is submitted by him that the appellant had paid duty under protest and the same has been recorded in the Bill of Entry. Hence there is no requirement for the appellant to challenge the same by filing an appeal. The department ought to have issued an order as to whether they dispute the protest made by the appellant or not.

3. The Id. AR Ms. K. Komathi appeared for the department. She submitted that since the authorities below have passed orders only on technical grounds, the matter has to be remanded to the adjudicating authority for considering the refund claim on merits.

4. Heard both sides.

5. After hearing the submissions and on perusal of records, we find that the appellant has paid duty under protest. Whenever an assessee pays duty under protest, it indicates a challenge by him on the demand of duty made by the department. Therefore it is for the department to pass appropriate assessment order considering the protest made by the assessee. In the present case, the decision of the Hon'ble Supreme Court in the case of ITC Ltd. Vs. Commissioner of Central Excise, Kolkata reported in 2019 (368) ELT 216 (SC) would not apply. The impugned order is set aside and the appeal is allowed by way of remand to the adjudicating authority who shall consider the refund claim on merits and pass orders.

(emphasis supplied)."

14. In the case of COMMISSIONER OF CUSTOMS VERSUS M/S. SAKTHI SUGARS LTD. (Customs Appeal No. 247 of 2011, Final Order No. 40175/2020 dated 29.01.2020) [2020 (4) TMI 840]; Hon'ble CESTAT CHENNAI has also held as below:-

'7. The first issue that arises for consideration is whether decision in the case of Priya Blue Industries (supra) and ITC Ltd. (supra) would apply to the facts of this case. Id A.R has argued that since respondent has not requested for reassessment of the Bill of Entry, they are not eligible for refund. It is not disputed that the respondents have paid the

cess at the time of filing the Bill of Entry under protest. The marking of protest itself gives information to the department that there is requirement for re-assessment. Assessment under Section 17 of Customs Act, 1962 cannot be said to be finalized when respondent has marked the protest while paying duty. In case, respondents had paid the entire duty without any mark of protest, in order to claim refund they have to request for reassessment of Bill of Entry. The mark of protest is an information to the department that the respondent is not making payment of cess voluntarily and then department has to initiate proceedings to vacate protest and pass speaking order for reassessment. If the department fails to do so the respondents cannot be put to any disadvantage of rejecting the refund claim. We find the first ground raised by the Ld. A.R cannot sustain and deserves to be brushed aside.

Therefore, observing the above orders passed by Hon'ble Tribunal, I am of the considered view that when duty is paid under protest, the protest itself tantamounts to challenge to assessment and further challenging/modification of the assessment for the purpose of refund in such cases as required in ITC judgment supra is not warranted. Therefore, when duty is paid under protest the ratio of decision in the case of ITC Ltd. Vs. Commissioner of Central Excise, Kolkata reported in 2019 (368) ELT 216 (SC) would not apply. Accordingly, provisions of Circular No. 24/2004-Cus. Dt 18/03/2004 will also not applicable in such cases. As the department has not disputed that duty has been paid under protest for all 174 nos of Bills of Entry, no infirmity can be attributed to the impugned refund order for not fulfilling the requirement of challenge/modification of the Bills of Entry in terms of decision made in ITC Ltd. Vs. Commissioner of Central Excise, Kolkata reported in 2019 (368) ELT 216 (SC). Therefore, from the impugned Orders of the lower authority, I find that the lower adjudicating authority has discussed all the facts on merits and has finally concluded that the subject Refund claims are due in favor of the Importer/respondent. Therefore, I don't find any reason to interfere in the impugned refund order passed by lower adjudicating authority and accordingly I uphold the same."

11.3. We do agree with the observations made by the Ld. Commissioner (Appeals) in the impugned order and hold that as there was a protest, duty was paid under protest, by the respondent. Therefore, the refund claims cannot be held as barred by the limitation and cannot be rejected on the ground that the refund claims were filed

*without challenging the assessment as assessment was not final."*

6.5. We observe that similar ruling have been passed in the case of *HDFC Bank v. Principal Commissioner of GST & Central Excise* [2020 (7) TMI 362 CESTAT Chennai], when it has been held as under:

*"After hearing the submissions and on perusal of records, we find that the appellant has paid duty under protest. Whenever an assessee pays duty under protest, it indicates a challenge by him on the demand of duty made by the department. Therefore it is for the department to pass appropriate assessment order considering the protest made by the assessee. In the present case, the decision of the Hon'ble Supreme Court in the case of ITC Ltd. Vs. Commissioner of Central Excise, Kolkata reported in 2019 (368) ELT 216 (SC) would not apply. The impugned order is set aside and the appeal is allowed by way of remand to the adjudicating authority who shall consider the refund claim on merits and pass orders."*

6.6. We find that the same view has been taken in the case of *Commissioner of Customs v. M/s. Sakthi Sugars Ltd.* [2020 (4) TMI 840], wherein it has been held as under:

*"The first issue that arises for consideration is whether decision in the case of Priya Blue Industries (supra) and ITC Ltd. (supra) would apply to the facts of this case. Ld. A.R has argued that since respondent has not requested for reassessment of the Bill of Entry, they are not eligible for refund. It is not disputed that the respondents have paid the cess at the time of filing the Bill of Entry under protest. The marking of*

*protest itself gives information to the department that there is requirement for re-assessment Assessment under Section 17 of Customs Act, 1962 cannot be said to be finalized when respondent has marked the protest while paying duty. In case, respondents had paid the entire duty without any mark of protest, in order to claim refund they have to request for reassessment of Bill of Entry. The mark of protest is an information to the department that the respondent is not making payment of cess voluntarily and then department has to initiate proceedings to vacate protest and pass speaking order for reassessment. If the department fails to do so the respondents cannot be put to any disadvantage of rejecting the refund claim. We find the first ground raised by the Ld. A.R cannot sustain and deserves to be brushed aside."*

6.7. Thus, by relying on the decisions cited supra, we hold that the refund claims filed by the appellant cannot be rejected on the allegation that those Bills of Entry filed in this case were not challenged by the appellant.

6.8. From the impugned order, we observe that one of the ground on which the refund claim filed by the appellant was rejected is that Original copies of some of the TR-6 challans were not presented and refund cannot be sanctioned on the basis of photocopies of the same. In this regard, we observe that non-availability of original copies of TR-6 Challans is a hyper technical objection and refund cannot be denied on such ground. It is a settled principle that even if original TR-6 challans are not available, the assessee cannot be denied refund when payment of duty can be verified from the Department's records. In this regard, we place our

reliance on the decision in the case of *The Commissioner of Customs, Cochin v. M/s Shree Simandar Enterprises [2012-TIOL-624-HC-KERALA-CUS]*, wherein it has been held as under:

*"9. The reasons put forward by the petitioner in the review petition justifying the insistence on the production of original documents also does not impress me at all. When an import is assessed to duty and penalty and fine are imposed, necessarily, the assessing authority maintains a file in relation to the same, which will contain all the documents in original relating to the levy. When payment is made pursuant to the orders of the assessing authority, details of the same would also be available in that file. When appeal is filed by the importer against the orders of the assessing authority the file will contain orders and details relating to the same also. Therefore, there is no difficulty for the assessing officers to decide the claim for refund based on those documents, when the appeal is allowed in full or in part. When payment as per the adjudication order is known to the assessing authority, refund as per the appellate order is the duty of the assessing authority. The assessing authority cannot retain the amount due to the assessee, even for a moment, depriving the assessee of the use of his money unreasonably. Refunds are made by crossed cheques in the name of the importer. Cheques are sent by registered post in the address of the assessee available in the file. As such there is no scope for any unauthorised person claiming and obtaining any refund or any duplication of the refund, unless the authority making the refund is negligent in his duties. Situation is the same even if the refund is after several years, if the file is still available. Therefore, I am of opinion that these contentions are raised only to find out some reason or other to deny the*

*petitioner, the legitimate refund due to the petitioner in the writ petition.*

*10. In this case as evidenced by Ext. P4, the petitioner has in fact filed an application for refund and produced copies of the chalan, copy of bill of entry and a working sheet, in addition to the appellate order, which, according to me, are more than sufficient for the purpose of making the refund as per the appellate order. The counsel for the petitioner in the writ petition submits that his copy of the original chalan is missing from his files. Even assuming that the original of the chalan is missing, and that a document is necessary for processing the refund nothing prevents the petitioner in the review petition from making the refund after obtaining an indemnity bond even though legally that even is not mandatory. If an assessee has lost a document that does not mean that he should lose his right to claim legitimate refund due to him for that reason alone. It is the usual practice in such cases to make refund after obtaining an indemnity bond, which would certainly safeguard the interest of the revenue in the matter against any possible future claim on the basis of the missing document. The petitioner in the review petition must have been aware of that legal position in view of the decision of the Tribunal quoted by the petitioner in the writ petition in his counter affidavit in this review petition, despite which the petitioner in the review petition had the audacity to make such frivolous contentions in this review petition. After acknowledging the liability to refund the amount as per the appellate order, which was also confirmed by this court in Ext. P5 judgment, the counsel during arguments tried to take the stand that since the petitioner in the writ petition had not challenged the order dismissing the refund application, the petitioner in the review*

*petition is not liable to make the refund at all, which contention was not even taken in the review petition in so far as the review petition was confined to the question of necessity to produce documents as condition for making the refund. That adds to the unreasonable stand of the petitioner in the review petition. Since that question does not arise in the review petition, I am not inclined even to consider the same. Even otherwise, insofar as the refund became due as per an appellate order, the petitioner cannot, under law, deny the benefit of the appellate order by passing another order rejecting the refund, especially when the petitioner in the review petition himself admits that the refund is not a refund as contemplated under Section 27 of the Customs Act, orders in respect of which alone an appeal would lie. Even otherwise, admittedly, that order was not served on the petitioner and has been returned by the postal authorities.”*

6.9. Regarding the rejection of the refund claim on the ground of 'unjust enrichment', we find that when the appellant decided to pay the duty 'under protest', they submitted a letter of protest dated September 4, 2004 to the Deputy Commissioner of Customs, New Custom House, IGI Airport, New Delhi, where the dispute first arose. In the said letter, the appellant categorically indicated that they would not pass on the burden of CVD to the consumers and it would be entirely borne by them. The appellant further stated that they would claim refund as and when they succeed in the appellate proceedings. We observe that the appellant has submitted a Chartered Accountant Certificate wherein the Chartered Accountant had certified that the amount of Rs. 1,40,33,559 paid as CVD under protest had

been shown under “loans and advances”; that it was not inbuilt in the sale price of the garments and that the burden thereof had not been passed on to anyone. We observe that the authorities below have wrongly ignored the certificate and arbitrarily assumed that the appellant had passed on the incidence of CVD merely by comparing the appellant’s sale price with the FOB value of a few items. In this regard, we observe that the lower authorities failed to consider that several charges were incurred by the appellant before selling the goods to the consumers like, freight, distribution charges, packaging and labelling charges, administrative charges etc. Thus, we observe that the reasons given by the lower authorities to substantiate the allegation that the appellant has not passed the test of unjust enrichment, is legally not sustainable. We observe that the Chartered Accountants is a professional who after verifying all the records of the appellant has certified that the appellant has not passed on the duty incidence to the customers. Such Certificate issued by a qualified professional cannot be ignored arbitrarily. Thus, on the basis of the Certificate, issued by the Chartered Accountant, we hold that the appellant has not passed on the burden of CVD to the consumers. Thus, we hold that the issue of ‘unjust enrichment is not applicable in this case.

6.10. In view of the above discussions, we hold that the rejection of the refund claim by the lower authorities on the ground of ‘time barred’, is not sustainable. We also hold that the refund claims filed by the appellant cannot be rejected on the allegation that those Bills of Entry filed in this case were not challenged by the appellant. We further hold that

the refund claims cannot be rejected on the ground that Original copies of some of the TR-6 challans were not presented and refund cannot be sanctioned on the basis of photocopies of the same. We also hold that the appellant has not passed on the burden of CVD to the consumers. Thus, we hold that the issue of 'unjust enrichment' is not applicable in this case.

7. In the result, we set aside the impugned order and allow the appeal filed by the appellant with consequential relief, if any, as per law.

(Operative part of Order was pronounced in Open court)

**(ASHOK JINDAL)**  
MEMBER (JUDICIAL)

**(K. ANPAZHAKAN)**  
MEMBER (TECHNICAL)

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